IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.159 OF 2005

K. S. Jhunjhunwala. ...

Petitioner.

Versus

Municipal Corporation & Ors. ...Respondents.

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Mr. M. S. Sanghavi with Mr. S.V. Sadavarte for the Petitioner.
Mrs. A. R. Joshi for Respondent No.1.
Mr.A. A. Kumbhakoni with Ms. A.Datta & Ms. Smita Shetkar for Respondent No.5.

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CORAM : DR. D.Y. CHANDRACHUD, J.

March 2, 2005.

P.C.:

The Petitioner has challenged an order dated 8th January 2005 passed by the Assistant Commissioner in the D-Ward of the

Municipal Corporation holding, in pursuance of a notice under Section 351 of the Mumbai Municipal Corporation Act, 1888, ("the Act"), that the structure which was in the occupation of the Petitioner is unauthorised and that it cannot be regularised under the Development Control Rules. The Petitioner has been called upon to remove the structure immediately on the receipt of the order, failing which demolition action would be carried out. A notice under Section 351 of the Act, was issued on 7th December 1988 in which it was stated that the Petitioner had carried out an unauthorised construction of a shed in the compound of a building admeasuring 34' x 10.6' with brick masonry work on two sides and with tin sheets on the top by taking the benefit of a compound wall and with an unauthorised installation of a gate so as to sub-divide the open space. An opportunity was given to the Petitioner to submit a reply thereto. On 5th January 1989, the Petitioner responded to the notice contending that the structure was in existence since long before, prior to 1963-64 and that it had been occupied by a Mali/Sweeper/Watchman and had been used for storing building and garage material. Absolutely no proof was

submitted in support of the legitimacy of the structure and it was stated that old records at the Tardeo office of the Petitioner had been destroyed in fire. An order was passed by the Deputy Municipal Commissioner holding that the documents submitted by the Petitioner did not amount to any authorisation in respect thereof. The Petitioner instituted a suit before the City Civil Court in 1989 in which an ad-interim injunction was granted on 20th January 1989. Eventually, under the directions of this Court, the matter was referred back for considering the reply of the Petitioner on the undertaking of the Petitioner that the suit would be withdrawn. Accordingly, a personal hearing was furnished to the Petitioner upon which the impugned order has been passed.

2. The Municipal Corporation in its affidavit in reply dated 9th February 2005 has stated that the structure is not reflected in the City Survey Plan. The Petitioner has, according to the Corporation, converted a garage tool shed into a regular construction and has put up new rooms in the compulsory open space, violating the

Development Control Rules. The Petitioner has, according to the Corporation, not submitted any document to show that the structure was in existence prior to the datum line of 1st April 1964. Moreover, it has been said that the assessment record showed that what has been assessed is not the structure in dispute which has been unauthorisedly constructed by the Petitioner.

3. An affidavit in reply has been filed by the 5th Respondent which is a Co-operative Housing Society of occupants on whose behalf a complaint was lodged before the Municipal Corporation. In the affidavit in reply, it has been stated that Panorama Co-operative Housing Society Ltd. is a Society registered under the Maharashtra Co-operative Societies Act, 1960. The father of the Petitioner was a partner in a firm by the name of Panorama Property which had purchased and owned the building in question known as “Panorama Building” standing on the plot of land at 203, Walkeshwar Mumbai-400 006. The firm developed the property by building five additional floors in 1966-69. In December 1971, the property was conveyed to a

Co-operative Housing Society formed by the erstwhile tenants as well as by the purchasers of the flats on the additional floors that were constructed. The society has stated that initially an open space admeasuring 180 sq.ft. on the North-Eastern corner was allotted to Panorama Estate for the purposes of Car parking. Panorama Estate was similarly a family concern and the space was being used for the purposes of parking of Cars. This, according to the Society, is also reflected in the Deed of Conveyance dated 24th December 1971. In 1975, according to the Society, a temporary detachable shed was admittedly built of GI Sheets upon the open space of land. In 1987-88, the Petitioner commenced to enclose the open shed with brick masonry walls so as to convert it into an office. The office bearers of the Society are stated to have lodged a complaint with the Municipal Corporation about this unauthorised user and construction. An encroachment to the extent of 540 sq.ft. was made by the construction of a regular structure. As already noted earlier, a notice under Section 351 was initially issued on 7th December 1988 which was followed by an order of removal passed by the Competent

Authority. This was challenged by the Petitioner before the City Civil Court without impleading the society as a party to the suit. On 4th June 1997, the society addressed a letter to the Ward Officer and on 24th June 1998, it was informed that the Petitioner had obtained an interim stay of the notice in the suit before the City Civil Court as a result of which no action could be taken. The society has stated in its affidavit that thereafter it requested the Ward Officer to furnish copies of the suit filed before the City Civil Court. No steps were, however, taken. On 3rd May 2003, the Society called upon the Petitioner to remove the unauthorised construction. On 16th July 2003, the society addressed a letter to the Assistant Engineer of the Municipal Corporation once again lodging a complaint. A further letter dated 19th December 2003 and a letter dated 22nd April 2004 to the Commissioner of the Municipal Corporation did not lead to any result. On 29th May 2004, the Municipal Ward Office informed the Society that the Legal Office has been informed to get the stay vacated. The Society has stated in its affidavit that it subsequently transpired that the suit in fact, was dismissed in default on 12th June 1998 after which

no injunction had even operated in favour of the Petitioner. A letter was thereupon addressed on 23rd July 2004 by the office bearers to the Assistant Engineer in the D-Ward. No action was adopted by the Municipal Corporation even thereafter. On 4th October 2004, a representation was addressed by the Society to the Municipal Commissioner. Finally, on 19th October 2004, the Ward Officer called upon the Petitioner to remove the unauthorised construction within seven days following which the Petitioner filed a Writ Petition before this court without impleading the Society as a party to the proceedings. On 5th November 2004, the Assistant Commissioner addressed a letter to the Chairman of the Society informing him that the Petitioner had approached this Court. The Petition was disposed of by this Court on 28th October 2004 as already noted earlier, directing the Assistant Commissioner to furnish a hearing and to pass a reasoned order. In these circumstances, the Society has submitted that despite its consistent efforts, no steps were taken by the Municipal authorities to pursue the matter seriously and to deal with a brazen encroachment in violation of the provisions of law. The Co-

operative Society has stated in its affidavit that an open space which was earmarked for Car parking has been converted into fullfledged office premises admeasuring 540 sq.ft. The unauthorised construction is stated to be in the compulsory side open space on the north-eastern side of the Society's premises. According to the Society, in the event of an emergency like a fire, even a Fire Bridge vehicle or ambulance would not be able to enter since the unauthorised construction encroaches upon the passage completely. In the petition, the Petitioner has relied upon a purported letter dated 25th April 1977 issued by the Municipal Corporation to the father of the Petitioner. The society has stated that there are serious reasons to doubt the genuineness of the aforesaid letter which has not surfaced on the record until this petition was filed. That apart, I find merit in the contention of the Society that the letter does not amount to either a regularisation of the unauthorised construction or an acceptance that the structure had been constructed prior to the datum line of 1st April 1964. All that the letter states is that the structure appeared to be very old. This obviously is a self serving document on which no reliance

can be placed.

4. At the hearing of this proceeding, Counsel appearing on behalf of the Co-operative Society has produced for the perusal of the Court, the sanctioned building plan of 22nd December 1964 which bears the stamp of the Bombay Municipal Corporation and the approval of the Executive Engineer. The area wherein the construction has been unauthorisedly put up by the Petitioner is marked in the plan for the convenience of the Court by a red coloured boundary line and it is apparent therefrom that the entire area as of the date of the sanctioning of the plan was an open area in which there was no construction. Therefore, it is clearly evident that on 22nd December 1964 when the plan was sanctioned, much after datum line of 1st April 1964, the area in question was an open area in which there was no construction. Counsel appearing on behalf of the Petitioner sought to place reliance on a document which was produced in the rejoinder and is annexed at Exh.C thereto. The document is the assessment record for the period 1964-65. However,

even the aforesaid assessment record only refers to the existence of a garage and not a built up office. The photographs placed on the record of these proceedings show that there is an encroachment in the compulsory open space by a conversion of an open space into the private area, with a huge iron gate to prevent access to the members of the Society. Such brazen acts of unauthorised construction defeat the right of the members of the society to the enjoyment of common open space. In the event of an emergency, there can be no gainsaying the fact that this would seriously impede access to emergency services such as those of the Fire Brigade. The unauthorised construction is in the compulsory open space. The Municipal Corporation is justified in holding that there is a violation of the Development Control Rules. The action of the Municipal Corporation, therefore, cannot be faulted. There is no merit in the Writ Petition which is accordingly rejected.

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